



PUBLIC NOTICE

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Federal Communications Commission
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FCC SEEKS COMMENT ON PROPOSED APPLICATION LIMIT FOR NCE FM NEW STATION APPLICATIONS IN OCTOBER 12 – OCTOBER 19, 2007, WINDOW

MM Docket No. 95-31

Comment Date: (15 days after date of publication in the Federal Register)

Reply Comment Date: (25 days after date of publication in the Federal Register)

On April 4, 2007, the Media Bureau ("Bureau") of the Federal Communications Commission ("Commission") announced a filing window opening on Friday, October 12, 2007 and closing on Friday, October 19, 2007 for FM reserved band (channels 201 – 220) applications for noncommercial educational ("NCE") FM new station and major change applications.¹

In the Commission's rulemaking proceeding on comparative standards for NCE applicants, we reserved the right to establish by public notice a limit on the number of NCE applications by a party in a filing window.² After the NCE FM filing window was announced, several parties involved in NCE FM station operations filed proposals to limit the number of NCE FM applications that any party may file during the filing window (the "Proposals").³ The Proposals uniformly express concern that failure to establish a limit on the number of NCE FM

¹ See *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (2007). We note that today the Bureau is releasing a Public Notice announcing the procedures and filing requirements for that filing window. See *Media Bureau Announces NCE FM New Station and Major Change Filing Procedures For October 12 – October 19, 2007 Window; Limited Application Filing Freeze to Commence on September 8, 2007*, Public Notice, DA 07-3521 (rel. Aug. 9, 2007).

² See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7422 (2000) ("NCE R&O"), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) ("NCE MO&O").

³ Parties to the Proposals include Station Resource Group, the National Federation of Community Broadcasters, Public Radio Capital, Pacifica Foundation, Prometheus Radio Project, United Church of Christ, Office of Communication, Inc., Public Radio International, California Public Radio, Western States Public Radio, College Broadcasters, Inc., Eastern Region Public Media, Native Public Media, Radio Training Network, Inc., Illinois Bible Institute, Cedar Cove Broadcasting, Inc., KSBJ Educational Foundation, Brown Broadcast Services, Inc., Donald E. Mussell, Jr., Reclaim the Media, and Common Frequency. Representative copies of the Proposals are available on the Commission's website at http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi. These proposals can be accessed by entering "95-31" in the "Proceeding" field.

applications that a party may file in the window would lead to a large number of speculative filings, creating the potential for extraordinary procedural delays.⁴ The Commission tentatively concludes that an application limit in the NCE FM filing window is an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the window-filed applications with limited Bureau resources.⁵ We further tentatively conclude that the following limit is appropriate:

A party to an application filed in the NCE FM filing window may hold attributable interests in no more than a total of ten applications filed in the window.⁶ If it is determined that any party to an application has an attributable interest in more than ten applications, the Bureau will retain the ten applications that were filed first – based on application file number – and dismiss all other applications. Major modification applications will not count toward the limit. Pending new and major change applications filed under former licensing procedures also will not count toward the limit.

We seek comment on this proposed limit. We specifically seek comment on whether ten applications is the appropriate limit to serve the goals described above, or whether a different number would be more appropriate. In particular, we note that our goal is to give interested parties the opportunity to apply for local and regional NCE FM outlets, subject to the apparent need for an application limit for the reasons described above.

As the Proposals note, there are a number of factors that suggest the potential for a large volume of NCE FM applications in the forthcoming window: (a) there is no filing fee; (b) there are no ownership limits in the reserved band; (c) there has been a “freeze” on NCE FM applications for seven years;⁷ and (d) full-service stations are more attractive to speculators than translator stations because they serve larger areas than translators, are permitted to originate programming,

⁴ The Commission previously has imposed limits on the number of applications that can be filed during a filing window for low power television and television translator stations. See *Low Power Television and Television Translator Service*, Report and Order, 2 FCC Rcd 1278 (1987). We note that in the *NCE R&O*, the Commission declined to impose any limit on the number of applications that a party could file. However, the Commission stated: “If the number of mutually exclusive applications received under the new [point] system exceeds our expectations, we reserve the right to establish by public notice a limit on the number of filings per applicant in a given period.” 15 FCC Rcd at 7422. On reconsideration, the Commission rejected proposed application limits, but reiterated that it reserved “the right to establish such a limit in the future by public notice, if the number of applications filed exceeds our expectations.” *NCE MO&O*, 16 FCC Rcd at 5105. Subsequently, in 2003, the Commission received more than 13,000 applications in a filing window for FM translator stations in the non-reserved band, an “extraordinary volume” considering that there were approximately 3,800 FM translator and booster stations licensed at the time. *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, 6777 (2005). Many of those applications were filed by “a relatively small number of non-local filers without any apparent connection to the communities specified in the application.” *Id.*

⁵ To the extent that any of the Proposals comment on other issues, such as potential modifications of the NCE FM comparative point system, we decline to take such matters into consideration at this time. Any comments submitted in response to this Public Notice should be limited to the issue of an application cap in the NCE FM filing window.

⁶ See *NCE R&O*, 15 FCC Rcd at 7418-20 (extending commercial attribution principles to NCE applications).

⁷ *NCE R&O*, 15 FCC Rcd at 7437.

and receive interference protection not available to translators. In addition, the Proposals provide specific and credible information concerning plans by some parties to file large numbers of applications, including applications known to be mutually exclusive with each other. Furthermore, the scarcity of NCE FM stations has made them more valuable than ever.⁸ We also note that applications for full-service stations present a prospect of “daisy chains” of conflicting applications, due to the size of the proposed service areas and the interference protection provided to full-service stations. Imposing a limit on applications is likely to allow more expeditious processing by reducing the number and complexity of such situations.

Almost all of the Proposals support a limit of ten applications in the forthcoming NCE FM filing window. We tentatively conclude that this is a reasonable limit to prevent mass filings by speculators and to permit the expeditious processing of window-filed applications while at the same time supporting the goals of localism and diversity reflected in the NCE FM point system.⁹ We propose to exclude major change applications from the limit, because those are not speculative in nature and do not pose the prospect of mass filings. For the same reasons, we also propose to exclude pending new and major change applications from the window filing limit.

FILING COMMENTS

Comments are due 15 days after date of publication in the Federal Register, and reply comments are due 25 days after date of publication in the Federal Register. **All filings must be submitted in MM Docket No. 95-31.** Pleadings sent via e-mail to the Commission will be considered informal and will not be part of the official record. Comments may be filed using (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.¹⁰

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal service mailing address, and the applicable docket number: MM Docket No. 95-31. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message: “get form”. A sample form and instructions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to

⁸ See, e.g., Marc Fisher, *To Air Is Divine, Say Backers of Imperiled Station*, Washington Post, July 29, 2007, at N1 (bids for an NCE FM station in the Washington, D.C. market exceed \$20 million as the “noncommercial end of the FM dial has become a battlefield” for parties seeking to obtain scarce spectrum).

⁹ See 47 C.F.R. § 73.7000 *et seq.*

¹⁰ See *Electronic Filing of Documents in Rulemaking Proceedings*, Report and Order, 13 FCC Rcd 11322, 11326, ¶ 8 (1998).

experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.
- People with Disabilities: To request materials in accessible formats for persons with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or contact the Consumer and Governmental Affairs Bureau at (202) 418-0530 or (202) 418-7365 (TTY).
- Copies of any filed documents in this matter are also available for inspection in the Commission's Reference Information Center: 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-7092.

A copy must be sent to the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail at www.bcpweb.com.

For further information, contact Irene Bleiweiss at (202) 418-2785 of the Audio Division of the Media Bureau. Press inquiries should be directed to Mary Diamond, Media Bureau, at (202) 418-2388. TTY: (202) 418-7172 or (888) 835-5322.

PROCEDURAL MATTERS

Statement of Legal Authority. The Commission's legal authority for limiting the number of applications a party may file during a broadcast filing window is found in 47 U.S.C. §§ 151, 152(a), 154(i) and (j), 301, 303(g) and (r), 308(b), and 309(j).

Ex Parte Restrictions. This proceeding (MM Docket No. 95-31) has been designated "permit but disclose" for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. *Ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission's rules applicable to non-restricted proceedings.¹¹ Parties making oral *ex parte* presentations are directed to the Commission's statement re-emphasizing the public's responsibility in permit-but-disclose proceedings and are reminded that memoranda summarizing the presentation must contain the presentation's substance and not merely list the subjects

¹¹ An *ex parte* presentation is any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner, a Commissioner's assistant, or other decision-making staff member, that, if written, is not served on other parties to the proceeding or, if oral, is made without an opportunity for all parties to be present. 47 C.F.R. § 1.1201.

discussed.¹² More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. §1.1206(b)(2).

Regulatory Flexibility Act. As required by the Regulatory Flexibility Act,¹³ we have prepared an Initial Regulatory Flexibility Analysis ("IRFA"), which is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing procedures and deadlines for comments on the proposed application limit, and should have a separate and distinct heading designating them as responses to the IRFA.

Paperwork Reduction Act. This document contains proposed information collections subject to the Paperwork Reduction Act of 1995 ("PRA").¹⁴ The Commission has OMB approval to collect these applications under OMB Control Number 3060-0029.

Action by the Commission on August 9, 2007: Chairman Martin, Commissioners, Copps, Adelstein, Tate and McDowell.

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¹² See *Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceedings*, Public Notice, 15 FCC Rcd 19945 (2000).

¹³ See 5 U.S.C. § 603.

¹⁴ See 44 U.S.C. § 3501 *et seq.*

APPENDIX

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, as amended ("RFA")¹⁵ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the potential application limit considered in *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in October 12 – October 19, 2007 Window*, FCC 07-145 (the "Public Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Public Notice. The Commission will send a copy of the Public Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").¹⁶ In addition, the Public Notice and the IRFA (or summaries thereof) will be published in the Federal Register.¹⁷

A. Need for, and Objectives of, the Proposed Limit

The Commission has determined that, absent a limit on the number of applications that a party may file in the filing window described in the Public Notice, it is likely that some parties may file a large number of speculative applications, including applications proposing stations in communities to which the applicant has no apparent connection and applications that are mutually exclusive with each other. Accordingly, the Commission has tentatively determined that a limit of ten applications for new NCE FM construction permits in the filing window is an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the NCE FM applications filed in the window. However, the Commission proposes to exclude from the limit pending applications and applications for major changes of existing NCE FM stations, because those applications are not speculative in nature and do not pose the prospect of mass filings. The Commission believes that the proposed limit will benefit small entities, as defined below.

B. Legal Basis

The Public Notice is released pursuant to Sections 1, 2(a), 4(i) and (j), 301, 303(g) and (r), 308(b), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i) and (j), 301, 303(g) and (r), 308(b), and 309(j).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁸ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small

¹⁵ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

¹⁶ See 5 U.S.C. § 603(a).

¹⁷ See *id.*

¹⁸ 5 U.S.C. § 603(b)(3).

organization,” and “small governmental entity” under Section 3 of the Small Business Act.¹⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²¹

Radio Broadcasting. The Small Business Administration defines a radio broadcasting entity that has \$6.5 million or less in annual receipts as a small business.²² Business concerns included in this industry are those “primarily engaged in broadcasting aural programs by radio to the public.”²³ We estimate that 95% or more of all NCE FM applicants will be small businesses according to this definition.²⁴ We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations²⁵ must be included. Our estimate, therefore, may slightly overstate the number of small entities that might be affected by the proposed application limit, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the application limit may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

¹⁹ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁰ *Id.*

²¹ 15 U.S.C. § 632.

²² 13 C.F.R. § 121.201.

²³ See NAICS Code 515112.

²⁴ According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of July 10, 2007, about 10,520 (95 percent) of 11,055 commercial radio stations in the United States have revenues of \$6.5 million or less. We believe the percentage would be higher for NCE FM stations, and higher still for NCE FM applicants that do not presently operate a station. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Further Notice of Proposed Rule Making, 13 FCC Rcd 21167, 21198 (1998).

²⁵ “[Business concerns] are affiliates of each other when one [business concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 C.F.R. § 121.103(a)(1).

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

We anticipate that none of the changes adopted as a result of the Public Notice would result in an increase to the reporting and recordkeeping requirements of broadcast stations or applicants for NCE FM authorizations. As noted above, we invite small business entities to comment in response to the Public Notice.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (c) the use of performance, rather than design, standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.²⁶

We are directed under law to describe any alternatives we consider, including alternatives not explicitly listed above.²⁷ The Public Notice describes and seeks comment on a proposed limit on the number of new NCE FM applications that may be filed during the filing window described in the Public Notice. The proposed limit is intended to benefit all small NCE entities seeking to establish a new NCE FM service on a local or regional basis by preventing mass filings of speculative applications. The proposed limit excludes both pending applications by NCE FM stations and applicants and new major change applications by existing NCE FM stations seeking to modify their existing authorizations, so the proposal involves no detriment to those applicants. At the same time, the proposed limit should benefit such applicants by expediting the review and processing of applications filed during the window. The proposed limit does not impose any significant compliance or reporting requirements because it would merely set a limit on the number of applications for new NCE FM authorizations that a party could file during the window. Accordingly, we are not aware of any alternatives that would benefit small entities. We encourage small entities to comment on the proposed limit described in the Public Notice.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Limit.

None.

²⁶ 5 U.S.C. § 603(c).

²⁷ 5 U.S.C. § 603(b).